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Nos. 372, 373.

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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1929.

THE CITY OF CINCINNATI, Petitioner,
vs.
MARGARET W. VESTER.

THE CITY OF CINCINNATI, Petitioner,
vs.
JAMES S. RICHARDS, *et al.*

(On Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to Review Its Decision Reported at 33 Fed. 2nd 242.)

AN APPENDIX TO THE BRIEF

Filed Amicus Curiæ, on Behalf of the People of the State of New York, Supporting the Principle of So-called "Excess Condemnation," Which is Written Into Their Constitution. This Appendix Being a Compilation of Some Data Toward a History of Excess Condemnation in the United States.

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Some Data Toward a History of Excess Condemnation in the United States.

England, from which we derive most of our ideas of due process, has made long and general use of excess condemnation. Canada uses it. In France, Germany and Belgium it is a time-honored method of effecting public improvements.* But enough of that. We shall take up the story in the United States, in the time of Chief Justice Marshall.

IN THE UNITED STATES IN THE 19TH CENTURY.

South Carolina, in 1817, enacted that the city council of Charleston, whenever it was deemed expedient to widen any street, lane or alley, should have full power to purchase or condemn, "the lots fronting on such street, alley or lane." In 1824 this statute came before a court. Counsel for the city urged that the statute gave the power of taking, in every instance, the whole lot. The court held that the statute intended only such portions of the land as were necessary for the street; that if it were construed to authorize taking more, it would be unconstitutional. *Dunn v. Charleston,* Harper's Report 189. The constitutional provision deemed relevant was the prohibition

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* For excess condemnation in England, see Herbert S. Swan, "Excess Condemnation, a Report of the Committee on Taxation of the City of New York," 1916, at pages 23-52. See Percy J. Edwards, "History of London Street Improvements." See Flavel Shurtleff, "Carrying out the City Plan," pages 125-132. See Mass. House Doc. No. 288 for 1904, pages 21-43, 53-101. For the experience of Montreal, see Flavel Shurtleff, at page 398 in "City Planning," edited by John Nolen. As for Germany see Senate Doc. No. 422, 61st Cong., 2nd Session; and also the texts mentioned above. See them also for France and Belgium. Upon the entire subject, see Robert Eugene Cushman, "Excess Condemnation," published by Appleton & Co., New York, 1917.

of the State constitution against taking property, except, "by the law of the land."

New York, in 1812, ch. 174, empowered the City of New York, in all cases where part only of any lot or parcel of land was required in opening or widening a street, to include the whole lot in the taking, and the corporation might, as to the excess over what was needed for the street, "appropriate the same to public uses, or sell the same." This statute was considerably used,* and not challenged until 1834, when it was held unconstitutional. *Matter of Albany Street,* 11 Wend. 149. The court deduced the constitutional prohibition from the authorization of taking for public use, and said that a taking for private use was, "in violation of natural right", and it did not matter whether feet or acres were involved.

See also, *Embury v. Conner,* 3 N. Y. 511; *Bennett v. Boyle,* 40 Barbour 551; *Matter of City of Rochester,* 137 N. Y. 243, 247.

A provision for excess taking, applicable to Brooklyn, was enacted by chapter 319 of 1833, but it seems to have required consent of the owner. The act incorporating the City of Williamsburgh, chapter 91 of 1851, contained a similar provision.

Massachusetts, by St. 1865, c. 159, provided for the opening of a street, and assessing the costs thereof upon the adjacent properties which were benefited, and further provided that the owner of

* Herbert S. Swan, op. cit. at page 54, lists some of the streets that were opened under authority of the 1812 statute.

a lot, taken in part, might elect to surrender all, and be paid the full value, and the city might sell the excess. This was held constitutional. *Dorgan v. City of Boston*, 94 Mass. 223, 241-242.* The case would seem to hold that the public has no constitutional protection from such "speculation" by the city; and the reasoning of the court appears to recognize no such protection of the land-owner, either.

Pennsylvania, in 1868, by Act. No. 1020, sec. 13, authorized the Fairmount Park Commission of Philadelphia to *"acquire"*, and to resell in absolute fee simple, the whole of any tract of land, part of which should fall within the boundaries of lands to be taken for the park. It is not clear whether this statute authorized condemnation, or mere acceptance.

New Jersey, in 1870, by ch. 117 of that year, authorized the replotting in Newark of narrow, short and irregular streets, taking all or any part of the land within certain limits, dividing it into suitable lots, and reselling it. We do not know whether it was exercised, and it seems never to have been challenged.

TREND TO CONSTITUTIONAL AMENDMENTS IN THE PRESENT CENTURY.

MASSACHUSETTS.

The Massachusetts legislature of 1903 provided for a committee to investigate and report upon the advisability of excess condemnation in the

* To similar effect, see Mayor etc. v. Clunet, 23 Md. 449, 463-465. The case of Boulat v. Municipality, 5 La. Ann. 363, involved a similar statute.

execution of improvement projects. The committee appears to have been most diligent and intelligent. Its two reports made in 1904* are the first real presentation of the case for excess condemnation ever made in this country, so far as we can discover.

The recommendations of the committee were enacted into law as chapter 443, Acts of Massachusetts, 1904, frequently described by writers as the "Remnant Act." One significant change was made, however, between the committee's draft and the enactment. The statute provided for taking the whole of any parcel, where part was actually required for a public work, and the remnant would from its size or shape be unsuited for the erection of suitable and appropriate buildings. It also provided that within six months after completion of the public work notice might be served upon the owner of property adjoining each remnant, to the effect that the public interest required such remnant to be united with his land. If he requested, appraisers should be appointed and the remnant offered to him at the appraised value. If he did not purchase, the remnant should be sold at public auction. In the committee's draft was the additional provision, omitted from the statute, that if the owner of such property adjoining a remnant declined to purchase it, all or part of such adjoining property might be condemned and sold with the remnant.

That this omission was vital to the constitutionality of the project, as viewed by the state

* Mass. House Docs. of 1904, Nos. 288 and 1096. Part of the former is quoted hereinafter. The latter is a 16 page supplemental report, by Edmund M. Parker, one of the committee, as to the workings of excess condemnation in Paris and Brussels.

court, may be inferred from the advisory opinion of the Supreme Judicial Court six years later. *Opinion of the Justices*, 204 Mass. 616, 91 N. E. 578. The court, in a previous advisory opinion*, had denied the constitutionality of a rather pretentious, but vaguely defined, specific proposal involving:

> "The obliteration in whole or in part of the present lines of individual ownership along such thoroughfare as may be laid out or constructed, the concentration through the power of eminent domain of such abutting estates in parcels of suitable size and shape, the laying out of rear streets, and the development and use of such parcels, under such restrictions as the public authorities may prescribe, for warehouses, mercantile establishments and other buildings suited to the needs of trade and commerce * * * "

Responding to a new inquiry, the court said (204 Mass. 619-620, 91 N. E. 579-580):

> "We are asked if it would make any difference if the proposed statute contained provisions like those of St. 1904, c. 443, §6. In our opinion, given to the House of Representatives, we intimated that this statute is constitutional. In our judgment it goes to the very verge of constitutionality. The grounds on which we are inclined to sustain it have little relevancy to the stated purpose of the unusual provisions of the proposed statute. They are, first, that there can be no taking outside the location of the public work, except of a remnant of an estate a part of which is actually required for the laying out, alteration or location of a public work, and then only 'if the remnant left after taking such part would, from its size or shape, be unsuited for the erection of suitable and appropriate

* Opinion of the Justices, 204 Mass. 607, 91 N. E. 405.

buildings'—in other words, only when there is a remnant that is too small or too illshaped to be of any practical value for the use to which valuable land is commonly put; and secondly, that such a remnant can be taken only upon an adjudication that public convenience and necessity require the taking. Unless it can be said that public convenience and necessity never can require the taking of such a remnant the statute cannot be declared unconstitutional.

"While it is plain that a city or town cannot take land outside a public work for speculative purposes, we can conceive of a remnant of an estate, a part of which is necessarily taken, which remnant is so small, or of such shape, and of so little value that the taking of it in the interest of economy or utility, or in some other public interest, may be fairly incidental and reasonably necessary, in connection with the taking of land for the public work. But this principle is not applicable to a taking for the larger purposes stated in the questions before us."

Thereupon, in 1911, the Massachusetts Constitution was amended to provide for condemnation of excess land, "no more in extent than would be sufficient for suitable building lots on both sides of such highway or street." The power has been exercised many times since then,* but seems never to have been challenged.

OHIO

In the year 1904 Ohio enacted that all municipal corporations should have power to condemn

* Ch. 186 of 1912, relative to Belmont Street in the City of Worcester; chapters 201 and 326 of 1913, also relative to Worcester; ch. 703 of 1913, relative to Bridge Street in Salem; ch. 177 of 1915, relative to a highway of Nonantum Square in Newton; ch. 329 of 1917, relative to Stuart and Eliot Sts. in Boston; ch. 320 of 1917, relative to a highway in Worcester; ch. 319 of 1925, also 357 of 1926, both relative to the Northern Route out of Boston; ch. 367 of 1926 relative to widening Bridge St. in Haverhill; ch. 364 of 1928, relative to extending Congress St. in Salem.

real estate, not only for establishing parks, boulevards, and other public reservations, but also, "for the purpose of reselling such land with reservations in the deeds of such resale as to the future use of said lands so as to protect public buildings and their environs and to preserve the view, appearance, light, air and usefulness of public grounds occupied by public buildings and esplanades and parkways leading thereto." (97 Laws 334) We do not know what use was made of this power, but it seems never to have been adjudicated.

Probably influenced by the Massachusetts precedent, in 1912 Ohio adopted a constitutional amendment authorizing excess condemnation. This is set out in a footnote to *City of Cincinnati v. Vester*, 33 Fed. 2nd 242. In part, it provides:

> "A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made."

It will be noted that the amendment affords no clue to the purpose of the excess taking which it authorizes, and no limit upon its amount, except what may be deduced from the reference to *resale with restrictions*. In the Vester case, and companion cases, there seems to have been no suggestion that any restrictions were contemplated or desirable. The District Court judge expressly found that the only purpose of the proposed resale was recoupment, and that there was no sug-

gestion as to restrictions. (R. 28, 29.) The Circuit Court of Appeals said (R. 106; reported p. 244):

> "The protection theory has no practical aspects, and may be entirely disregarded. The proofs do not show that the city has any present plan for beautifying or establishing building restrictions on the south side of Fifth street."

It is regrettable that the cases did not arise through the state courts, which could have best interpreted the constitutional amendment in the light of all relevant considerations, and determined whether each of the condemnations involved was within the supposed authority.

PHILIPPINE ISLANDS

In 1905, following a fire in Cebu, a committee was created to provide for widening the streets and adjusting the ownership of land within the so-called "burnt area". Acts of the Philippine Commission, No. 1393. The committee was charged with the duties of laying out streets, adjusting all questions of ownership, and making "such equitable allotment and adjustment of land within said burnt area as may be necessary and practicable, caused by the widening of existing streets, and in the laying out of new streets". It was empowered to acquire title to all lands within the area, by gift or cession, and if necessary by condemnation. We are informed that a most complete adjustment of plots was accomplished, but we do not know whether the constitutionality of such acts was ever challenged.

MARYLAND.

In 1904, following a great fire in Baltimore, there was created by statute what was known as the Burnt District Commission, with power to open streets, etc. By chapter 108 of 1906 this Commission was given power to accept and to resell remnants. This was similar to the Massachusetts statute of 1867.

In 1908 by chapter 166 was enacted a very broad authorization for the City of Baltimore, to purchase or condemn lands adjoining parks, etc., and to sell it subject to restriction for the protection of the public property. This provision was similar to the Ohio statute of 1904.

In 1910 by chapter 110 the Mayor and Common Council of Baltimore, or, by their delegation to it, the Commission on City Plan created under the act of 1908, was authorized to open a public highway, defined by a general description of its termini and course. The act authorized such body, "to acquire for said purposes landed or other property in the bed of said highway and adjacent thereto on either or both sides thereof." Such body should have the power to condemn and acquire by purchase or condemnation such lands, and should also have certain other powers, "*including the powers vested in it by chapter 166 of 1908.*" To effectuate these purposes stock in the amount of a million dollars was authorized.

In 1911 the constitutionality of this project, under certain provisions of the statute constitu-

tion, was challenged in a suit to enjoin issue and sale of the stock. *Bond v. Mayor etc. of Baltimore*, 116 Md. 683, 82 Atl. 978. The constitutionality of the statute was upheld, but only by the most convenient innocence and blindness on the part of the court, entirely avoiding discussion of the 1908 statute and the reference to it.* Said the court:

> "We think it is clear that the only purposes for which property is authorized to be condemned are those set out in section 1 of the act, to wit: For the purpose of establishing a public highway over Jones' Falls and making connections between said highway and other highways crossing or adjacent thereto. And this being so, there can be no possible or serious dispute that the use for which property may be acquired and can be taken under section 1 of the act is for a public use."

CONNECTICUT.

By Special Laws 1907, p. 43, the City Planning Commission of Hartford was authorized to acquire land, by eminent domain or otherwise, for establishing parkways, streets, sites for public buildings, and reservations about and along and leading to any of them, and after the completion of such public improvements, "may convey any real estate thus acquired and not necessary for such improvements, with or without reservations concerning the future use and occupation of such real estate so as to protect such public works and

* It appears that the Mayor and Common Council proceeded under the 1910 statute themselves, instead of delegating to the Commission on City Plan, in which were vested the powers of excess condemnation under the 1908 act. Philadelphia, etc., Ry. Co. v. Baltimore, 121 Md. 504, 88 Atl. 263. This fact may have justified passing over the 1908 statute in the Bond case.

improvements and their environs, and to preserve the view, appearance, light, air and usefulness of such public works."

We are informed that Hartford has on several occasions used this act with reference to small gores,* but its constitutionality seems never to have been litigated.

VIRGINIA.

In 1906, by chapter 194, the cities and towns of Virginia were authorized to acquire, and to resell subject to limitations as to use, property adjoining parks or monuments, or in the vicinity of them, which is so used as to impair their beauty or usefulness, or property adjacent to a street, of such topography that it impairs the convenient use of the street, "or renders impracticable, without extraordinary expense, the improvement of the same."

By chapter 71 of 1916 the following paragraph was added:

> "And any city or town in this Commonwealth proposing to open or widen a street by taking any part of a block or square in such a manner that the value of the property abutting the proposed street would be injuriously affected unless the property on such block or square is re-platted and the property line re-adjusted, then and in that event the city or town at the same time it acquires the land for said street may, in its discretion, also acquire by purchase, gift, condemnation or

* Herbert S. Swan, op. cit., page 86, note. The Corporation Counsel of Hartford says the act has never been expressly resorted to, but in laying out streets occasionally a slight excess has been taken and sold.

> otherwise, all or any part of the property on such squares or blocks and may subsequently re-plat and dispose of the property so acquired, in whole or in parts, making such limitations thereof as it may see fit."

This was the statute which was challenged, in 1921, in the case of *Richmond v. Carneal*, 129 Va. 388, 106 S. E. 403. The court noted that the proposed street merely cut off a little corner of Carneal's lot, not affecting his house, which was a home and a place of business, where he had been for thirty or forty years. It noted that the proposal was to take land not needed for a street, replat it and sell it, presumably at a profit, as no reason was assigned for the excess condemnation except that the city council was of opinion, "that not to acquire all, or parts of the property on certain blocks, squares or lots, through which the proposed street will pass, would render it impracticable, without extraordinary expense, to make the proposed improvement." The court concluded that such a taking was not for "public use", and so was in violation of the state constitution.

The relevant provision of the state constitution is found in section 58:

> "It [the general assembly] shall not enact any law whereby private property shall be taken or damaged for public uses, without just compensation."

In 1928 there was added to this provision, in completion of the sentence, these words:

> "the term 'public uses' to be defined by the general assembly." *

* The next session of the Virginia legislature after the constitutional amendment commenced on January 8, 1930, at which session some excess condemnation may be adopted.

PENNSYLVANIA.

In 1907, by Act No. 315, there was conferred upon all the cities of Pennsylvania, not only the power to appropriate property for parks, parkways and playgrounds, but also power to appropriate, "neighboring private property, within two hundred feet of the boundary lines of such property so appropriated * * * in order to protect the same by the resale of such property with restrictions * * *" A brief in support of this statute was filed with a congressional committee in 1909, and shows the views upon which the legislation was supported.* In 1913 the statute came before the state Supreme Court, and was adjudged unconstitutional. *Penna. Mut. Life Ins. Co. v. Philadelphia,* 242 Pa. 47, 88 Atl. 904.

It seems that the plaintiff corporation owned two lots sixty-six feet wide and one hundred sixty feet deep, having frontage on a down-town street, and that the city proposed to open a new parkway passing diagonally across the rear of the lots. The city passed an ordinance in 1912 providing for condemnation of certain described private property outside of and not more than two hundred feet distant from the proposed parkway, including plaintiff's lots. The plaintiff sought to enjoin condemnation of its lots, alleging, "that the portion of its property lying outside of the parkway was taken by the city to resell to the Bell Telephone Company of Pennsylvania, a private corporation, or to other private parties." The city denied this allegation, and asserted that the taking was to secure control of the property to

* Senate Doc. No. 422, 61st Cong., 2nd Session, pages 30-36.

protect the parkway as authorized by the Act. The court noted that, "this denial must be read in connection with the ordinance of January 16, 1913, which became effective after the answer of the city was filed, authorizing the mayor to execute an agreement selling the property appropriated outside the parkway, including plaintiff's property, to the telephone company." There seems to have been no showing whatever as to the specific relations of this transaction to protecting the appearance and usefulness of the proposed parkway.

Even if there were appropriate restrictions in view, the court felt that the act gave an authority too arbitrary. The court said:

> "It deprives the owner of his right to accept the restrictions and retain the property on the same terms as the city's vendee would hold it. It empowers the city, at the pleasure of its officials, to transfer property on which is a business plant owned by one individual or corporation to another who is engaged in the same or another business. One man may be deprived of his home for the benefit of another. In view of its provisions conferring almost unlimited discretion on cities or their officials in exercising the powers granted, it is idle to say that the statute furnishes no opportunity to produce such results or to promote a private purpose."

A proposed constitutional amendment authorizing excess condemnation was passed in 1915*, but

* Joint Resolution No. 1 of 1915. This provided as follows:
"The State, or any municipality thereof, acquiring or appropriating property or rights over or in property for private use, may, in furtherance of its plans for the acquisition and public use of such property or rights, and subject to such restrictions as the Legislature may from time to time impose, appropriate an excess of property over that actually to be occupied or used for public use, and may thereafter sell or lease such excess, and impose on the property so sold or leased any restrictions appropriate to preserve or enhance the benefit to the public of the property actually occupied or used."

apparently it was not submitted to a subsequent legislature, or to popular vote.

OREGON.

In 1913, by chapter 269, this state conferred upon cities power to condemn and to sell, subject to restrictions, for protection of the public property, land in excess of that needed for public squares, parks or playgrounds. The only limitation is that the excess property be within two hundred feet of the public property, and that its control be reasonably necessary in order to protect such public squares, parks or playgrounds, their environs, the preservation of the view, appearance, light, air, health or usefulness thereof. These provisions were amended in 1921, ch. 192, and are found in the codification of Oregon Laws, sections 3837-3844. They appear not to have been the subject of litigation.

WISCONSIN.

In 1909, by chapters 162 and 165, each being a different and independent provision, the right was conferred upon cities and counties to condemn, and to resell with appropriate restrictions for protection of the public property, additional areas near streets, squares, parks, public buildings, etc. There was no specific restriction as to distance.

In 1911, by chapter 486, cities were given such a power relative only to boulevards and park-

ways and limited to land within three hundred feet.

We are uncertain whether these provisions were ever used, and cannot find that they have ever been the subject of litigation, or been repealed.

In 1912 Wisconsin adopted an amendment to its constitution, at Article XI section 3-a, as follows:

> "The state or any of its cities may acquire by gift, purchase, or condemnation lands for establishing, laying out, widening, enlarging, extending, and maintaining memorial grounds, streets, squares, parkways, boulevards, parks, playgrounds, sites for public buildings, and reservations in and about and along and leading to any or all of the same; and after the establishment, layout, and completion of such improvements, may convey any such real estate thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation of such real estate, so as to protect such public work and improvements, and their environs, and to preserve the view, appearance, light, air and usefulness of such public works."

In 1913 a much broader amendment was proposed* but was defeated upon submission to popular vote in 1914.

We do not know how extensively excess condemnation has been employed in Wisconsin; nor

* Joint Resolution No. 25 of 1913. This was identical in language with the proposition, hereinafter quoted, defeated in New York in 1911.

does the article by Walter H. Bender, Esq., in 13 Marquette Law Rev. 69 [1929] entitled "Excess Condemnation in Wisconsin", cast much light upon that question.

RHODE ISLAND.

In 1916 Rhode Island adopted Article XVII of amendments to its constitution, as follows:

> "The general assembly may authorize the acquiring or taking in fee by the state, or by any cities or towns, of more land and property than is needed for actual construction in the establishing, laying out, widening, extending or relocating of public highways, streets, places, parks or parkways; Provided, however, that the additional land and property so authorized to be acquired or taken shall be no more in extent than would be sufficient to form suitable building sites abutting on such public highway, street, place, park or parkway. After so much of the land and property has been appropriated for such public highway, street, place, park, or parkway as is needed therefor, the remainder may be held and improved for any public purpose or purposes, or may be sold or leased for value with or without suitable restrictions, and in case of any such sale or lease, the person or persons from whom such remainder was taken shall have the first right to purchase or lease the same upon such terms as the state or city or town is willing to sell or lease the same."

The last provision suggests difficulties in its operation, but we cannot find that there has been any litigation relative to the amendment.*

* We note that at least one statute was enacted in 1929 under the Amendment. This is chapter 1453, relative to taking land in the City of Central Falls for highway purposes. Probably there have been other similar acts since 1916.

ILLINOIS.

In the Plan of Chicago, published in 1909, the need for excess condemnation in carrying out the plan was presented, it then being supposed that a statute would be sufficient. Decisions in other states indicated the need that excess condemnation be authorized by constitutional amendment, and in 1918 a pamphlet* was published recommending the calling of a constitutional convention to consider this and other proposals. Such proposals were before the Constitutional Convention of 1920, and we believe were adopted by it, but the entire work of the Convention failed of acceptance upon submission to popular vote, for reasons not involving the merits of excess condemnation.

In 1927 an act of General Assembly was passed (1927 Laws of Illinois, page 227) subsequently approved by Chicago voters, providing for excess condemnation on a somewhat guarded plan, as follows:

> "In any case brought under the statutes of the State of Illinois for the acquirement of property through the exercise of the right of eminent domain, whether the same is done in connection with a local improvement or otherwise, it shall be lawful for the City of Chicago to take in fee simple and to hold, lease or sell more land than is needed for public improvement whenever the court in which the proceedings have been instituted finds that such excess land is required to protect, preserve or aid the improvement and is reasonable in quantity therefor."

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* "Excess Condemnation, why the City of Chicago should have the power," etc., a report prepared by the Chicago Bureau of Public Efficiency. September, 1918. 58 pages.

MICHIGAN.

In 1928 there was added to the state constitution, as Article XIII, section 5, the following provision:

> "In exercising the powers of eminent domain and in taking the fee of land and property that it needed in acquiring, opening, and widening of boulevards, streets and alleys, municipalities shall not be limited to the acquisition of the land to be covered by the proposed improvement, but may take such other land and property adjacent to the proposed improvement as may be appropriate to secure the greater degree of public advantage for such improvement. After so much of the land and property has been appropriated for any such needed public purpose, the remainder may be sold or leased with or without such restrictions as may be appropriate to the improvement made. Bonds may be issued to supply the funds to pay in whole or in part for the property so appropriated, but such bonds shall be a lien only on the property so acquired and they shall not be included in any limitation of the bonded indebtedness of such municipality."

CALIFORNIA.

In 1914 and in several subsequent years constitutional amendments permitting excess condemnation were proposed and failed to be adopted. In 1928 the following provision was adopted as Article I, section 14-1/2:

> "The state, or any of its cities or counties, may acquire by gift, purchase or condemnation, lands for establishing, laying out, widening, enlarging, extending, and maintaining memorial grounds, streets, squares, parkways

and reservations in and about and along and leading to any or all of the same, providing land so acquired shall be limited to parcels lying wholly or in part within a distance not to exceed one hundred fifty feet from the closest boundary of such public works or improvements; provided, that when parcels which lie only partially within said limit of one hundred fifty feet only such portions may be acquired which do not exceed two hundred feet from the closest boundary, and after the establishment, laying out, and completion of such improvements, may convey any such real estate thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation of such real estate so as to protect such public works and improvements and their environs and to preserve the view, appearance, light, air and usefulness of such public works. The Legislature may, by statute, prescribe procedure."

NEW YORK.

New York State, which seems to have been the pioneer in enacting excess condemnation, and anticipated only by South Carolina in holding such legislation unconstitutional,* seems also to have established, in some respects, a priority in the trend to constitutional amendments.

It was on March 4, 1910, that the *Opinion of the Justices* (204 Mass. 607, 91 N. E. 405) was handed down. On March 17 a concurrent resolution to write excess condemnation into the New York constitution made its appearance in the Legislature. It had previously been introduced in 1909,

* These topics were treated above, page 2.

but had failed of adoption. This proposal, which was defeated upon its submission to the people in 1911, read as follows:

> "When private property shall be taken for public use by a municipal corporation, additional adjoining or neighboring property may be taken under conditions to be prescribed by the legislature by general law. Property thus taken shall be deemed to be taken for public use."

It is difficult to conceive of a broader provision. It suggests no limitation whatever, of purpose or extent. It would seem that the voters of New York State displayed wise discrimination when they defeated that proposal by votes of 254,095 and 357,881; and when two years later they adopted, by votes of 424,928 and 270,467 the present provision (N. Y. Const., Art. I, sec. 7):

> "The legislature may authorize cities to take more land and property than is needed for actual construction in the laying out, widening, extending or relocating parks, public places, highways or streets; provided, however, that the additional land and property so authorized to be taken shall be no more than sufficient to form suitable building sites abutting on such park, public place, highway or street. After so much of the land and property has been appropriated for such park, public place, highway or street as is needed therefor, the remainder may be sold or leased."

An amendment adopted in 1927 added the words *"and counties"* after the reference to *cities* in the first line.

This power of excess condemnation has been conferred upon several cities, and at least one county. *

In Buffalo it has been used, at least in the case of Lovejoy street, where improved lots approximately 100 feet in depth were taken in connection with widening 24 feet along one side of the street. We are informed that the City of New York has exercised the power of excess condemnation "in twelve or fifteen proceedings, but with few exceptions, the amount taken in excess has been limited to the remnants of parcels parts of which were taken for the improvement." Syracuse has used excess condemnation in widening South Salina Street, one of its principal business streets. We are informed that Rochester has exercised the power in twelve or thirteen cases, at least it has adopted about that number of ordinances providing for excess condemnation in specific cases. For some references to actual use, in Rochester, see hereinafter, page 47.

There are only two cases, so far as we can learn, where the power has been challenged. *Matter of City of Rochester*, 227 App. Div. 151 (Nov. 7, 1929) did not express any view upon the constitutional point, although it was raised. We are informed that the city has accepted that decision.

* Full power of excess condemnation was vested in certain cities, as indicated: Syracuse, ch. 300 of 1914; New York City, ch. 593 of 1915 and ch. 112 of 1916; Rochester, ch. 431 of 1920; Buffalo, ch. 429 of 1920; Jamestown, ch. 665 of 1923, sec. 45; Yonkers, ch. 556 of 1926; Poughkeepsie, ch. 545 of 1928. Niagara Falls was vested with the power, in connection with widening Main St. only, ch. 170 of 1923. Erie County was vested with full power of excess condemnation, ch. 538 of 1929. Since enactment of the City Home Rule Law, ch. 363 of 1924, separate enabling acts for specific cities may be unnecessary.

Matter of City of Yonkers v. M. E. D. Corporation et al., now pending in the state Supreme Court, at special term in Westchester County, was a case of an important street widening, using excess condemnation, originally opposed on other grounds, and in which the constitutional question was first raised in October, 1929.

The case of *Matter of Tuthill*, 163 N. Y. 133, 57 N. E. 303, 49 L. R. A. 781, decided in 1900 by the highest court of New York State, should here receive mention, not because it is relevant, but because relevancy has several times been falsely attributed to it. The true significance of the case appears to be correctly stated by the official headnote: *"Drainage Act (L. 1895, ch. 384) not authorized by Art. 1, Section 7, State Constitution,* and is void."* The opinion by Gray, J., so far as concerns all his references to the 14th amendment of the federal constitution, was concurred in by *none* of the five other judges sitting in the case. See the final page of the opinion. Apparently L. R. A. errs, by indicating that Haight, J., concurred in the opinion of Gray, J., instead of in the memorandum of Parker, Ch. J., which expressly said that the provision of the State Constitution did not violate the Federal Constitution. Subsequent decisions of the federal Supreme Court support the memorandum, and repudiate the dictum of Judge Gray. *Clark v. Nash*, 198 U. S. 361; *Strickley v. Highland Boy Gold Min. Co.*, 200 U. S. 527.

* This reference is to an earlier and separate part of the same section, relating only to drainage.

THE LITERATURE OF EXCESS CONDEMNATION.

No effort will be made to be complete in references. An effort will be made to be representative. The purpose will be, under this heading, to afford quotations indicating what has been published, in the United States in the present century, indicating the justification for excess condemnation, and the appropriate occasions for its exercise. If these quotations are truly representative, they reflect the views, economic and political, which prevailed, and are prevailing, in the trend to constitutional amendments authorizing excess condemnation.

First, and outstanding, in this field, is the Massachusetts report of 1904.* The following excerpts are from pages 4-8 of the majority report:

> "The committee presents the following conclusions:
>
> It has clearly appeared, from the evidence submitted to us, that the present system of laying out new streets or widening or altering existing ones, under which only the land actually required for the street is taken, is, especially in those parts of cities which are covered with existing buildings, productive of serious public disadvantages; and a brief consideration of the matter is sufficient to show that this difficulty is inherent in the sys-

* Mass. House Doc. No. 233 for 1904. Report of a committee to investigate excess condemnation. 101 pages. The report itself occupies the first 14 pages; the draft of the proposed act appears at pages 15-20; pages 21-43 deal with excess condemnation experience in London; pages 44-52 with the French system; pages 53-101 with those and also the provincial towns of England. This last was a separate report by Mr. Meyer, who dissented from the two other committeemen, in that he did not regard excess condemnation as justifiable even in the case of remnants. See page 14. Mass. House Doc. No. 1098 for 1904 is a 16 page supplemental report, by Edmund M. Parker, one of the committee, as to the workings of excess condemnation in Paris and Brussels.

tem itself, and must persist unless some modification of that system can be devised.

The land abutting on any existing street is divided and arranged in lots, which, as well as the circumstances have admitted, are adapted to the street in its present condition, and the buildings thereon are constructed in conformity therewith. Any widening of the street not only destroys the existing buildings, but, by reducing the size of the abutting lots, leaves the residues or remnants of many of them of such shape and size as to be entirely unsuited for the erection of proper buildings, unless and until these remnants have been united with the adjoining properties, generally with those in the rear, which are thus enabled to extend out to the new street lines.

The same condition is found, and frequently even to a greater extent, when a new thoroughfare is laid out through existing blocks covered with buildings.

Hence, when an existing street is widened or a new thoroughfare is laid out under the present system, the lots on one or both sides of the new or widened street are left in such condition that, until a rearrangement can be made, no suitable buildings can be erected thereon, and the public benefit to be derived from the improvement is in great measure lost.

The street may be valuable as a thoroughfare or as one for through traffic, but not for either business or residence purposes; and striking instances of this have been presented to the committee in connection with street improvements in the City of Boston.

Not only is such a situation a great disadvantage to the city, in hindering and sometimes preventing its proper development, but it will easily be seen that this state of affairs renders the collection of betterment assessments extremely difficult, since the bene-

fit to the surrounding property which should accrue from the improvement is actually not received until these residues or remnants have been united with the adjoining lots—a process which, under the present system, may take years.

It often happens that the owners of these remnants, desirous of deriving some income therefrom in the meanwhile, erect thereon temporary structures, unsuited for proper habitation or occupancy; and such structures are too frequently made intentionally objectionable, both in appearances and in the character of their occupancy, for the purpose of compelling the purchase of such remnants at exorbitant prices; with the result that a new thoroughfare, which should be an ornament to the city, is frequently for a long period after its construction disfigured by unsightly and unwholesome structures, to the positive detriment of the public interests. These results, which seem inevitable under the present system, may operate to prevent the undertaking of much-needed street improvements.

These matters are forcibly presented in the testimony of Mr. Charles, chairman of the Board of Street Commissioners of Boston, and of his associate commissioners, Mr. Duane and Mr. Gallivan, to which testimony especial attention is directed.

Furthermore, it is believed that the taking of whole estates, instead of taking the greater part and leaving an undesirable remnant, would not materially increase the initial expense of the undertaking; inasmuch as a city which takes, under the present system, so much of an estate as to leave the remainder unsuited for building purposes, is often obliged to pay for the value of the part taken, and for the damages to the remaining part practically as much as it would be obliged to pay for the whole estate.

What has been said above indicates the

public considerations which render a change in the existing system desirable.

There is also, however, another side to the question, viz., that of the private owner, the consideration of which appears to point to the same conclusion. It frequently happens that an owner, the greater part of whose estate is necessarily taken for a public work, would prefer not to be left with the remnant on his hands, and, if an opportunity were offered, would voluntarily request the city to take the whole estate. Many people recognize that there is less opportunity for differences of opinion upon the question of the market value of a whole estate than over the more complicated question of the value of the portion which has been taken, and the damages to the remainder by reason of such taking; and hence a system under which the city could acquire the whole estate would be productive of greater ease in the settlement of damages, and less likelihood of litigation over the question involved therein.

* * * *

With regard to the acquirement by compulsory taking of land beyond the limits of a given public work, we find that two different systems have prevailed:

1. The taking, in addition to the land actually required for the public work, of all the property within certain bounds in the neighborhood of the proposed work; the rearranging of the lot lines of the property so acquired; and the disposal of this property by sale or lease for the benefit of the city.

2. The taking, in addition to the land actually required for the public work, of such residues or remnants of lots only which, in consequence of the taking for the public work, will be left of such shape and size as to be unsuited for the erection of proper buildings; and also of such portions of the adjoining properties as it may, in consequence of

the refusal of their owners to purchase these remnants, be necessary to acquire, in order to make proper building lots abutting on the proposed street.

In favor of the first system, it has been urged that, in consequence of the carrying out of the proposed public work, there will be an increase in value of the surrounding property, caused by no act of its owner, but entirely by the act of the public body, and at the public expense; that it is inequitable that such increase in value should not accrue to the public, to the expenditure of whose money it is solely due; that the method of acquiring the abutting property in the neighborhood is the best method of securing such benefit to the public; that it is far simpler and more equitable than any system for the collection of betterments; and that, if the owners of the abutting property are paid its full value as it was before the improvement took place, they have no cause to complain.

This is the system which, in substance, has been adopted for important street improvements in many cities of Great Britain, Belgium, Switzerland and Italy, and has, we are informed, been on the whole successful in its operation, and is believed in certain cases to have materially reduced the cost of public improvements.

As against this system, it is urged that the State ought not to dispossess the private owner of his property simply in order that the public work may be carried on at less cost, through re-sale of the property so acquired; that the expense of public works should be met by taxation, and not by the taking of private property for no other purpose than to benefit the public exchequer by its re-sale; that the owner to take property for such purposes, as it contemplated by the first system is practically a power to enter into a land speculation, which may result disastrously.

In the case of our cities, there is the further objection that the adoption of such a system might easily carry the initial cost of an undertaking beyond the debt limit of the municipality.

In support of the second system, it is urged that the ends of public necessity and convenience, for which private property may properly be taken, can all be accomplished by limiting the taking, in addition to the land actually required for the public work, to such remainders of lots as are by themselves unsuited for proper building purposes, and by uniting them to the adjoining properties, compulsorily, if necessary; and that the right to take private property should not be extended beyond these salutary limits.

Such is the system which, originally established for the City of Paris, has now been extended to many of the other important cities of France, and under which many of their great improvements have been carried out; and such a system should, it would seem, if fairly and judiciously applied, be ample to our needs.

In the draft of an act herewith submitted we have, in substance, adopted this plan, and believe that it will be time enough to consider adopting a more comprehensive scheme if the plan proposed shall, after a fair trial, be found insufficient to our needs."

Nothing of particular importance in this field has come to our attention, from the time of the 1904 report just quoted, until 1910.

The presentation of excess condemnation, made incidentally to other proposals, before the Senate Committee on the District of Columbia, in 1909

by Mr. Benjamin Clarke Marsh,* was unsatisfactory. The recoupment feature was all he touched upon, and it clearly had no appeal to the Senators.

In 1912 Hon. John De Witt Warner prepared a report * leading to the conclusion that "excess condemnation" (*i. e.*, condemnation motivated primarily by expectation of recoupment) was unconstitutional, but that "incidental condemnation" (*i. e.*, condemnation motivated primarily for a public use or benefit rather than recoupment) was constitutional. The following quotations are from that report:

> "'Excess' condemnation involves the practice of a state (or municipal division thereof), in order to realize profit for public account, so to use its governmental prerogative as to get a footing to compete with the citizen in 'business'—that is to say, such activities as are normally impressed with no trust for public service. 'Incidental' condemnation involves the taking, whenever the public needs them, of all such lands as, for convenience, economy or other essential conditions, are needed for public use.
>
> "How radically these differ is obvious. How narrow is the dividing line is equally plain. For it might be argued—and in the past has been maintained, especially in continental Europe—that, provided only the citizen is paid full price for property taken, he has no just ground for complaint, even though the taking be one that arbitrarily displaces him in order to give the public the

* Senate Doc. No. 422, 61st Cong., 2nd Sess. See particularly page 12.

* "Report on Scope and Limits of Expropriation—'Incidental' vs. 'Excess' Condemnation," by John De Witt Warner. Pamphlet, 30 pages. Published by Dept. of Docks and Ferries, New York City, May, 1912. For an account of Mr. Warner, see Who's Who in N. Y.; also Who's Who in America.

very opportunity for speculation or investment for profit of which it deprives him. And continental cities are frequently allowed to condemn lands by wholesale for disposal at retail, at such profit as to offset what would otherwise be the cost of what they keep.

"But it may now be considered as well settled in America (1) that a citizen cannot be compelled to part with his property in order to enable the public to do what is normally the business of the citizen, and (2) that investment for resale at profit (even though transacted by the public) is a business of *private character* rather a *public use*. Two criteria have been suggested. One, legal precedent for which is established, is that, provided the essential purpose of the taking is a public one, incidental results of private character may be disregarded. * * * The other test suggested is that of the duty—which carries with it the power of the public to do in businesslike fashion whatever it is given the right to do at all. * * * But when it is considered that practicability itself is largely a matter of proportion between expense involved and results to be gained, this criterion merges in the other, with this difference: That in the latter case it is the *taking* (as distinguished from the *use*) that is incidental—a distinction that in its turn frequently dwindles to the vanishing point."

* * *

"Within the more obvious applications of the principles already established, to reform slum conditions by condemnation of large areas for parks or for streets to give access and proper circulation is a proper though most costly use of public funds—justified by the health and order thus promoted, though it but indirectly affects the more vital conditions involved. This granted, can there be a question but that we may also enforce and even provide for housing, living and business

conditions as we already do for education and recreation? And even more so, can we not?—should we not?—do this in the way at once most conservative and enterprising—by taking freely all lands needed for thorough and economical treatment to such use; retaining them only so far and so long as needed therefor; and selling the rest to be developed by private enterprise under the bettered conditions to secure which they were taken? Thus considered and administered, *Incidental Condemnation* would be a self-adjusting process by which the public shall ever so meet the ever developing conditions of civilization as to keep most open the field for public enterprise and lessen the obstruction and extortion to which the development of every city is subjected by minors, absentees, speculators and 'dog-in-the-manger' interests. For each of these, protection in holding property it cannot or will not use, until for public ends it is taken at full compensation, is as generous treatment as any owner can ask or any self-respecting community grant.

As compared with this, *'Excess' Condemnation*—to permit the public to speculate in land—is a contrast. Incidental Condemnation uses government power to clear the way for the best development of private enterprise, and thus to promote it. Excess Condemnation would not merely rival private enterprise but discourage it in the very direction where it is most needed, and thus add to public burdens. Indeed, the very ground on which Excess (as distinguished from Incidental) Condemnation is favored—that of financial profit to the community in order to pay for public improvements without recourse to taxation—is that on which Excess Condemnation should rather be condemned. For Incidental Condemnation would permit every taking needed to facilitate any *public* function—that is any business which the com-

mon sense of a state judges can best be done the public business only such as the common sense of the community still considers as more properly the subject of private than of public enterprise, and public meddling with which will be most likely to be demoralizing and disastrous—to private business by unequal competition therewith; to the public by its unfitness to do such business and the certainty (masked as for the time it may be) that taxpayers must pay for it in the end. Incidental Condemnation is but the use of business methods in public business—Excess Condemnation an experiment in what, as a practice, civilization distrusts.

"It is no answer to say that the experiment of to-day may be the normal of tomorrow. For we are discussing not how far the public should be allowed to try experiments as such, but rather the methods by which it can prudently transact the business which is admittedly its duty. Nor are we suggesting limits to the public powers every community must assert; but rather that the benefit of any doubt shall always be given toward relegation to private enterprise of activities not needed to fulfill any public function—among which will long remain real estate speculation."

At about the same time the Warner report appeared, there was published in The American City* a signed editorial, by Mr. William Bennett Munro, of the Bureau for Research in Municipal Government, Harvard University, in part as follows:

"Throughout Europe it has long been the practice of cities, in carrying through their projects of street reconstruction, to take by condemnation proceedings more private land

* 6 Am. City 627-628, April, 1912. For an account of Mr. Munro, see Who's Who in America.

than is actually needed for the improvements themselves. Then when the work is finished the unused lands are sold at the enhanced prices and the municipality is enabled thereby to recoup itself for at least a part of its outlay. * * * In the United States, under existing constitutional provisions, street reconstructions upon this plan are seldom possible. * * * This situation places serious obstacles in the way of all large municipal undertakings. It means, for one thing, that although public improvements add greatly to the value of all private property within an adjacent zone, the city gets only a small share of this increment by means of a betterment levy, and often not even that. Moreover, when streets are broadened or new ones opened, these new thoroughfares are certain to be fronted, under our present restrictive arrangements, by irregular and small-sized lots of land wholly unsuitable for proper building development. These lots are in the hands of various private owners, and the task of consolidating them by private negotiations is always tedious and difficult. That is why, for years after a street has been widened, the lots on both sides of it look as though they had passed through a bombardment. Prompt rebuilding is impossible; the reconstruction of private property must be preceded by a process of land consolidation which often takes years to accomplish. * * * There are, of course, grave and obvious objections to anything which would allow cities to indulge in a carnival of land speculation under the guise of public improvement schemes. As a buyer and seller of land the average American city has a pretty poor record. * * * But the Massachusetts system has great merits, quite apart from the question of financial saving * * * ."

Meanwhile the present New York constitutional provision had been passed by the 1912 legislature.

The Annual Conference of New York Mayors had never made the earlier and far broader proposal the subject of a resolution, but on June 10, 1912, at Utica, the representatives of some thirty-five cities of the State passed the following resolution:

> "Whereas, all the cities of the State are concerned with plans for improvement requiring the acquisition of land for public purposes, and under existing laws are unable to accomplish these purposes to the fullest extent because they cannot acquire or control the use of lands abutting on such improvements, therefore,
>
> "Resolved, that the Constitutional Amendment which has passed the present Legislature authorizing what is known as 'excess condemnation', be strongly approved by this Conference and its passage by the next Legislature and its approval by the people is earnestly recommended as a means of far-reaching importance to all the cities."

A month later, at the 18th annual meeting of the National Municipal League at Los Angeles, Mr. Robert S. Binkerd, secretary of the New York City Club, reported for the League's committee on excess condemnation, of which he was chairman, in part as follows:*

> "In built-up portions of modern cities necessary street adjustments cannot be made without leaving much of the abutting property in unusable or unsuitable form. The scattered private ownership of such parcels long retards proper development along the improvements, and represents an economic drag on the whole city. * * * For a city to spend thousand or millions of dollars in the creation of parks, boulevards and public

* See 2 Nat. Mun. Rev., supplement, page 24. For an account of Mr. Binkerd, see Who's Who in N. Y.; also Who's Who in America.

places and then to permit the destruction of the beauty it has created by idiosyncrasies of abutting property owners is a waste of public moneys. The only thoroughly effective instrument for protecting such public investments and for correlating city land into its most usable forms is the power of excess condemnation vested in city governments. Whatever recoupment may be received from the re-sale of property so acquired is but an incident in the exercise of this power for public purposes. Even though there be no recoupment, there is a substantial financial advantage in the ability to acquire whole parcels and thus escape the payment of damages for the destruction of the usability of a parcel."

Mr. Binkerd was a member of the Committee which in January, 1913, reported to the Mayor of New York City, in part as follows*:

"The City should be empowered to exercise the right of excess condemnation in undertaking public improvements, especially in the laying out of new streets and in the widening or extension of old ones. The financial advantage that will accrue to the City from the exercise of this right will be found quite as much in the increase of the taxable values due to the more economic replotting of areas adjacent to such improvements as to the profits derived from the resale of surplus land. The land adjacent to a street is generally divided into plots, the shape and size of which are adapted, as well as might be, to the street's present use and condition. Widening a street, or laying out a new one in a built-up quarter, disturbs this equilibrium. Not only are the existing buildings destroyed but the abutting lots, after the work's comple-

* "Report of the Commission on New Sources of City Revenue," City of New York, submitted to the Mayor, etc., Jan. 11, 1913. Pamphlet, 116 pages. The quotation is from pages 79-80.

tion, are frequently left so distorted in shape and so diminutive in size as seriously to impair, if not utterly to destroy, the proper use and development of the thoroughfare. For such a street to attain its natural importance it is necessary that the land fronting upon it should be wholly rearranged and replotted.

There are many instances in New York where street improvements have appropriated all but ten or twenty square feet of large lots. Remnants of such small size are not only useless themselves, but they also keep other lands to the rear of them from being utilized to their best advantage. The present practice in making street improvements, in fact, instead of enhancing the values of the adjacent land, frequently so militates against its best economic use as actually to cause depreciation in the taxable values of the City.

Under excess condemnation, the City might, in addition to the land requisite for a thoroughfare, appropriate these small parcels, obliterate the existing lot lines, and replot the frontages of the street in a manner conductive to its most wholesome development. The City would be in a far better position than the private owners to replot these injuriously affected estates. The cost, moreover, of acquiring the additional land would be negligible. When so much of a lot has to be taken as to leave the remainder practically worthless, the price that must be paid for the appropriated part is, as a rule, as great as the market value of the whole."

In 1914 was published a volume by Mr. Flavel Shurtleff*, wherein he devoted a chapter to "Ex-

* "Carrying Out the City Plan," by Flavel Shurtleff. A Russell Sage Foundation Publication. Sub-octavo, 349 pages. Published by Survey Associates, Inc., New York, 1914. The chapter on excess condemnation is at pages 103-137. The quotation is from pages 136-137. For an account of Mr. Shurtleff, see Who's Who in N. Y.; also Who's Who in America. Frederick Law Olmstead collaborated in the text cited.

cess Condemnation". On the last pages of it, he set forth these conclusions:

> "In the absence of more convincing precedents too much reliance should not be placed on excess condemnation as a method of distributing the cost of public improvements. Where the maximum physical benefit from an improvement can be secured under the present restricted power of eminent domain, excess taking should not be resorted to except in rare cases where it would involve few expensive buildings and where the land value is so low that the inevitable tendency is upward. Rather than introduce excess taking for the purpose chiefly of recouping the city's investment, the highest possible return should be sought by the American method of special assessment, already proved an eminently successful method of distributing the cost of the acquisition of land for public purposes.
>
> "But the use of excess taking to protect in value, both economic and esthetic, of a business thoroughfare, park, or parkway is sometimes essential to the full success of a great improvement. Only by its use in some cases can the full advantage of an improved thoroughfare be secured by providing abutting lots of size and shape adapted for suitable structures. Only by selling surplus land under restrictions can the city most effectively control the fringe along the widened thoroughfare. Whether its use results in a net financial profit or not is a secondary consideration if it accomplishes a necessary result more completely and efficiently than can otherwise be done."

In 1915, in The American City*, appeared an article by Mr. Frank B. Williams, relative to city

* "City Planning Restrictions on Private Property," 12 Am. City 470-476. The quotation is from page 474. For an account of Mr. Williams, see Who's Who in N. Y.; also Who's Who in America.

planning and the restrictions upon private property which it involved. In the course of this he said:

"Excess condemnation is most often urged either in case of a new business street cut, or an old one widened, through a low class development in the center of the city, or of a boulevard in the outskirts through unimproved land. In either case one or more of three effects may be expected:

"First, the adjacent land may be raised in value. May not, in this event, the building of the street and the taking of the extra land to sell again in order to help pay for the street be regarded as one business enterprise? The courts of this country are inclined to think not. There are decisions stating that the extra taking and resale are a separate real estate transaction, and therefore not a taking for a public use.

"Secondly, the cutting of the new street may leave remnants of lots on either side of it not large enough for independent improvement, which shut off the land immediately back of it from the street and from the possibility of improvement in connection with the street. If building on the street be delayed until private initiative unites land ownership in these cases, the delay will be a long one. The result will be that the city will lose much in taxes, and the new street, by reason of its ugly appearance for so many years, be given perhaps a character that will permanently impair its usefulness and lower values on it. On this second ground the courts seem inclined to uphold excess condemnation."*

* Mr. Williams cites no decision in support of that last sentence. The third expected effect, or motive for excess condemnation, which he discusses, is the possibility of resale with protective restrictions.

The year 1915 also saw the publication of an elaborate report on "Excess Condemnation", made by the Committee on Taxation of the City of New York, of which the principal part is a report prepared by Mr. Herbert S. Swan, lawyer and city planning consultant, of New York City, for the National Municipal League*. The Committee refers to the constitutional amendment adopted two years before, and to the very recent act empowering the city to exercise excess condemnation. It refers to the three possible justifications for such exercise, and says of the replotting of remnants (page 6):

> "New York furnishes several 'horrible examples' in cutting new streets through sections already built up without excess condemnation. Delancey Street in Manhattan and Flatbush Avenue Extension in Brooklyn have both been held back in development and in the increased value which the improvement promised, by the small, irregular, odd-shaped building lots which were left.* These are in many cases unsuited to proper building unless united with adjoining properties held by other owners. The public loses in tax value and sightliness and the private owner is injured because his lot is not available for suitable development. A glance at the maps accompanying this report, showing the lot lines after these streets were cut through, is proof conclusive of loss and waste under the old system. Although the Flatbush Avenue Extension has been practically completed for three years and despite its strategic position, development has not begun. The street still looks, to borrow an expression of Lawson Purdy's, 'as if it had been devastated by an earthquake.' European nations long ago met

* "Excess Condemnation." New York, 1915. Octavo, 122 pages, with many illustrations, folding maps and statistical tables, etc. At page 13 it is stated that much of this material was used by Mr. Lawson Purdy before a committee of the New York Assembly at Albany, in advocating the adoption of a resolution providing for the excess condemnation constitutional amendment. The maps and photographs appearing pages 99-118, which are apparently some of this material, are particularly striking, and are bound in at the back of the present compilation.

* Folding map at back of this Appendix shows the Flatbush Avenue Extension situation.

this situation and have empowered local governments to relocate and replot such areas. Excess condemnation would leave the city free to rearrange and subdivide the land fronting the improvement into plots of the size and shape best suited to the proposed development."

As to recoupment, the Committee says (page 7):

"While revenue is not the principal reason for excess condemnation it is a strong incidental consideration."

It is not practicable, and might be thought unduly burdensome upon the reader, to reprint the material by which Mr. Swan supports his argument for employing excess condemnation for the replotting of lots, particularly in connection with widening streets. His method of arguing from specific examples of what had happened when certain streets in New York City were opened without benefit of excess condemnation, has seemed so meritorious that some of his material has been bound in at the back of this Appendix.

We trust that the report of Mr. Swan can at least be scanned sufficiently to appreciate the nature of the data, and the wealth of it, by which he supports his argument. Among other interesting conclusions, are these:

"As has been pointed out, leaving shallow and misshapen remnants in the possession of private owners hampers the city's economic development. As much can be said for its aesthetic development. Frontages which, if connected with adjacent land, would furnish sites for substantial and ornamental struc-

tures, are now occupied by ugly shanties or billboards. * * * The expediency of condemning excess lands for the purpose of obtaining control over the character and use of buildings fronting on an improvement should be weighed against that of other means of accomplishing the same result—restricting the height of buildings, segregating buildings according to occupancy and prescribing building lines. The police powers so exercised may at times serve the same purpose as excess condemnation and be resorted to in place of it.

* * * * *

Recoupment must be viewed rather as an incident in the achievement of a large social and political program than as an end in and by itself. * * * The aims of excess condemnation are something more than mere pecuniary profit. Its conducement to civic beauty by regulating the elevations and facades of buildings, its promotion and encouragement of commercial and business development by affording sites of shape and size suitable to the erection of structures comporting with the potential importance and use of the city's thoroughfares, and the light, air and unobstructed view admitted to parks, parkways and playgrounds, are assets not subject to capitalization. Their value must be sought in the increased convenience and well-being of the community."

Mr. Swan, in an article in The American City in 1916* summarized his report mentioned above, and said:

"The case of excess condemnation rests primarily upon two considerations—the replotting of remnants and the control of land adjacent to improvements."

* "Excess Condemnation in Street Improvements," 14 Am. City 258-262. The quotation above is from page 258.

In 1916, in the volume of essays on "City Planning," edited by John Nolen,* appeared a brief account of excess condemnation, written by Flavel Shurtleff. He deals only with the recoupment feature, which he does not favor, and says nothing about the replotting or protective motives. He says, in part, of excess condemnation:

> "Its value as a financial expedient has hardly been tested in America, and the principle of the amendment is so contrary to the spirit of individual rights that rapid headway cannot be expected in view of the litigation which will follow its use. * * * The city is really something of a speculator. * * * It appears from a parliamentary inquiry on the subject in England that the consensus of those best informed was against its use for purposes of recoupment alone."

The volume by Charles Mulford Robinson, on "City Planning,* which also appeared in 1916, contains a chapter on excess condemnation. It reviews the history, advantages and dangers, quotes Walter L. Fisher and Flavel Shurtleff, and pronounces no particular conclusion, beyond an indication that replotting may be a justification for excess condemnation.

The first and only full volume on excess condemnation which has ever appeared in the United

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* "City Planning," edited by John Nolen. Being a volume of the National Municipal League Series. Sub-octavo, 447 pages. D. Appleton & Co., New York, 1916. Biographies of contributors in front pages. An account of Mr. Nolen may be obtained from Who's Who in America. Mr. Shurtleff has previously been mentioned and quoted herein. His chapter is entitled "City Financing and Planning," and the quotation relative to excess condemnation is from page 297. A second edition was published in 1929.

* "City Planning, with special reference to the Planning of Streets and Lots," by Charles Mulford Robinson. Octavo, 344 pages. G. P. Putnam's Sons, New York, 1916. The chapter on "Excess Condemnation" is at pages 255-264.

States, so far as we can learn, was published in 1917.* The author was Robert Eugene Cushman, instructor in political science in the University of Illinois. He devotes a chapter to the constitutionality of excess condemnation, and concludes:

> "In the light of these facts it seems fair to assume that the judgment of the Supreme Court upon the constitutionality of excess condemnation will depend upon the purpose for which that policy is used. If the only motive for the application of that scheme was to secure to the city treasury the profit which might accrue from the resale of the surplus land taken it could probably be argued with much cogency that the financial need of the city did not constitute a public purpose of the kind which would justify the condemnation of the land of particular citizens, and that the use of eminent domain for that purpose was a denial of the equal protection of the laws and a deprivation of property without due process of law.
>
> There seems, however, to be nothing in the utterances of the Supreme Court thus far which would preclude its adopting the view that the effective replotting of remnants of land otherwise unusable and the adequate protection of the beauty, health and usefulness of improvements admittedly public in character are objects so important to the community welfare as to render the use of excess condemnation for those purposes a justifiable exercise of the right of eminent domain."

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* "Excess Condemnation," by Robert Eugene Cushman. Being a volume of the National Municipal League series. Sub-octavo, 322 pages. D. Appleton & Co., New York, 1917. Contains a bibliography, discussion of merits and demerits, history of excess condemnation especially in its legal aspects, and other valuable material. The chapter on constitutionality appears at pages 275-310, and the quotation is of its last two paragraphs, page 310.

In 1918 the Chicago Bureau of Public Efficiency published its pamphlet on excess condemnation*, urging that it be provided by amendment of the Illinois constitution. Chief stress is laid on the replotting motive, although the protective and recoupment motives are recognized and not disapproved. The thirteen maps showing remnants left in some street changes actually made in Chicago, and in some proposed street changes, afford a valuable supplement to the graphic illustrations by Swan and Purdy, already referred to, of similar results in New York City. These illustrations, and the text, indicate the emphasis on the remnant or replotting motive. As to the recoupment motive, the pamphlet says at page 52:

> "From the financial standpoint, it is doubtful whether European cities have been able to secure as effective results in defraying the cost of street improvements by acquiring surplus lands through condemnation proceedings and then selling them after the improvement has been made as Chicago and other American cities have been able to secure by the special assessment plan. However, in some of the recent larger improvements the London County Council has combined the special assessment system with excess condemnation with very satisfactory results."

Herbert W. Swan reviewed the foregoing report of the Chicago Bureau, and said in part:*

> "Such excess takings of land as are necessary to obtain an economic replotting of

* "Excess Condemnation. Why the City of Chicago should have the power in making public improvements, to take property in excess of actual requirements. Lessons to be drawn from certain unfortunate aspects of the Twelfth Street and Michigan Avenue widening projects and the proposed Ogden Avenue Extension." Report prepared by the Chicago Bureau of Public Efficiency, September, 1918. Pamphlet, 58 pages.

* "Excess Condemnation," an article appearing in 8 Nat. Mun. Rev. 174-175, in the year 1919.

the new frontage constitute good business practice even though they may sometimes have to be executed at a financial loss to the municipality.

The primary object of a street improvement is not to make it absolutely impossible to use the adjoining property—as one might mistakenly suppose upon viewing the extension of Seventh Avenue, New York, Fairmount Parkway, Philadelphia, or Twelfth Street, Chicago—but to facilitate the movement of city traffic by providing new or wider thoroughfares. Were we of a cynical disposition we might ask whether it were not better that the erstwhile village streets should choke with metropolitan traffic than that the appearance of the city should be forever marred and ruined as a result of improvements executed without regard to the replottage of contiguous and neighboring land."

In 1923 the National Municipal League, as publisher, and Mr. Lawson Purdy, as author, contributed to the literature of excess condemnation a small but excellent pamphlet.*

One other contribution should be noticed. In January, 1925, at the annual meeting of the American Society of Civil Engineers, an entire afternoon was devoted to excess condemnation and its relation to various phases of city planning. The material so presented was reported in the American City Magazine for the following month.*

On that occasion Mr. Frank B. Williams said, in part:

* "Why we need Excess Condemnation," by Lawson Purdy. Reprinted from National Municipal Review for July, 1923, Vol. XII. Pamphlet, 8 pages. For an account of Lawson Purdy, see Who's Who in N. Y.; also Who's Who in America.

* 32 Am. City 135-137. Feb., 1925. "The Use of Excess Condemnation in the Opening and Widening of Streets."

"The practical man realizes that the development of the land outside the lines of the given improvement, so as to harmonize with the improvement within them, is essential to the attainment of the maximum usefulness of that improvement. In short, he knows that the outside land—not in fact 'excess'—is needed for the improvement. * * * In the United States excess condemnation is not needed, as it is abroad, for the recoupment of expense to be obtained by it; in this country these advantages can be obtained by imposing local assessments on those specially benefited. * * * Excess condemnation is needed for the harmonious planning and subsequent development of the land within and just outside the lines of the main development; and for this there is no substitute for excess condemnation."

At this same meeting, Mr. Arthur L. Vedder, Deputy Superintendent of City Planning in Rochester, N. Y., contributed some interesting information about the actual use of excess condemnation in that city. He said it had been used, "*in numerous instances*", four of which he illustrated by maps and explanations published in the article referred to. Were it practicable, these would be reproduced.

Aside from the maps and photographs, this concludes our presentation of data toward a history of excess condemnation in the United States. What conclusions this data may justify, are to be presented elsewhere.

HENRY S. MANLEY.

Albany, N. Y.
January 23, 1930.

NOTE:

The photographs and maps which follow, are taken from a report on Excess Condemnation prepared by Herbert S. Swan for the National Municipal League in 1915. From the following language, appearing therein at page 13 we conclude that the same material was used before the New York Legislature when it was persuaded to adopt the constitutional amendment in 1912 and 1913:

> "The maps used by Mr. Lawson Purdy before a committee of the New York Assembly at Albany in advocating the adoption of a resolution to amend the Constitution so as to authorize excess condemnation, demonstrate this advantage resulting from excess condemnation more eloquently than any words. The writer is indebted to Mr. Purdy for the maps and photographs used in this report to illustrate New York conditions."

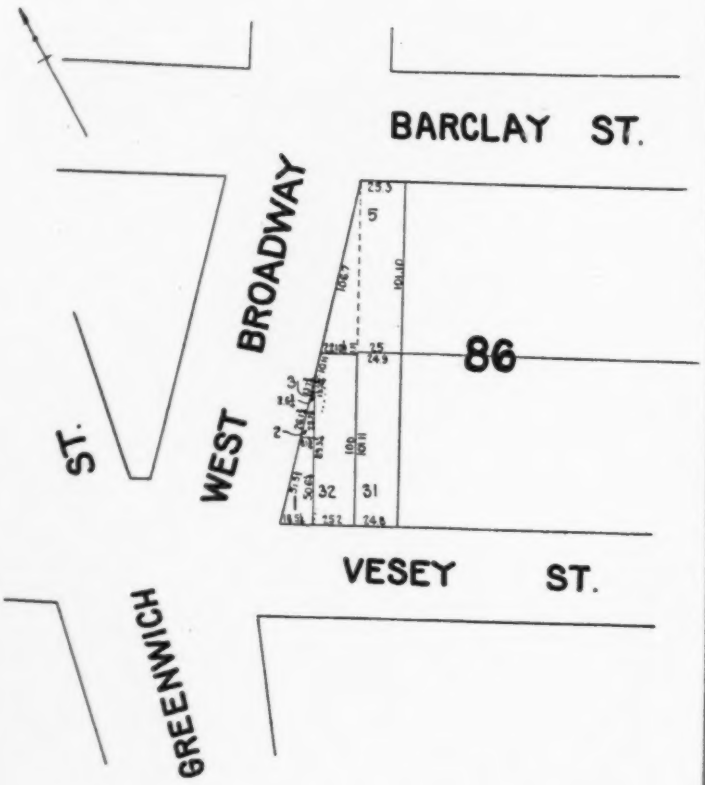
PHOTOGRAPHS AND MAPS SHOWING OPERATION OF SYSTEM HERETOFORE USED IN NEW YORK.

Explanatory Note.

These photographs and maps were prepared to show some of the results of the system of condemnation heretofore used in the absence of the power of excess condemnation. They indicate the damaged and unusable condition of lots mutilated by the improvement and lots so situated that appropriate buildings could not be erected. They were prepared under the direction of the Department of Taxes and Assessments by Mr. John A. R. Duntze, of that department.

BLOCK 86—EAST SIDE OF WEST BROADWAY, BETWEEN BARCLAY AND VESEY STREETS

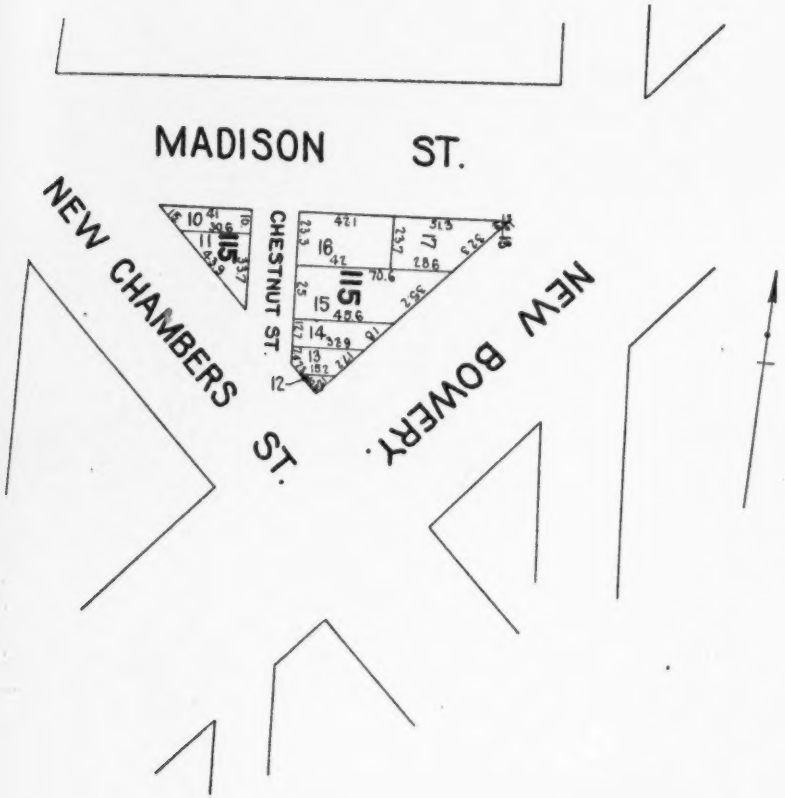
Widened 1894 Photographed 1915


BARCLAY ST.
WEST BROADWAY
ST.
86
5
32
31
VESEY ST.
GREENWICH

BLOCK 11—NEW CHAMBERS STREET, BETWEEN MADISON STREET AND NEW BOWERY; NEW BOWERY, BETWEEN MADISON STREET AND NEW CHAMBERS STREET

Widened 1856

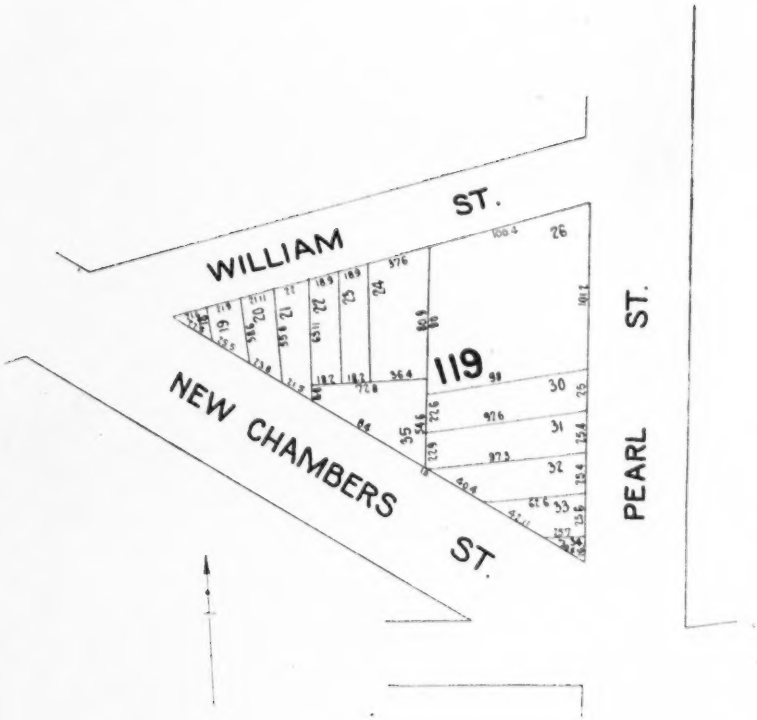
Photographed 1915


MADISON ST.
NEW CHAMBERS ST.
CHESTNUT ST.
NEW BOWERY.
115
115
10
11
16
17
15
14
13
12

BLOCK 49 NORTH SIDE OF NEW CHAMBERS STREET, BETWEEN WILLIAM AND PEARL STREETS

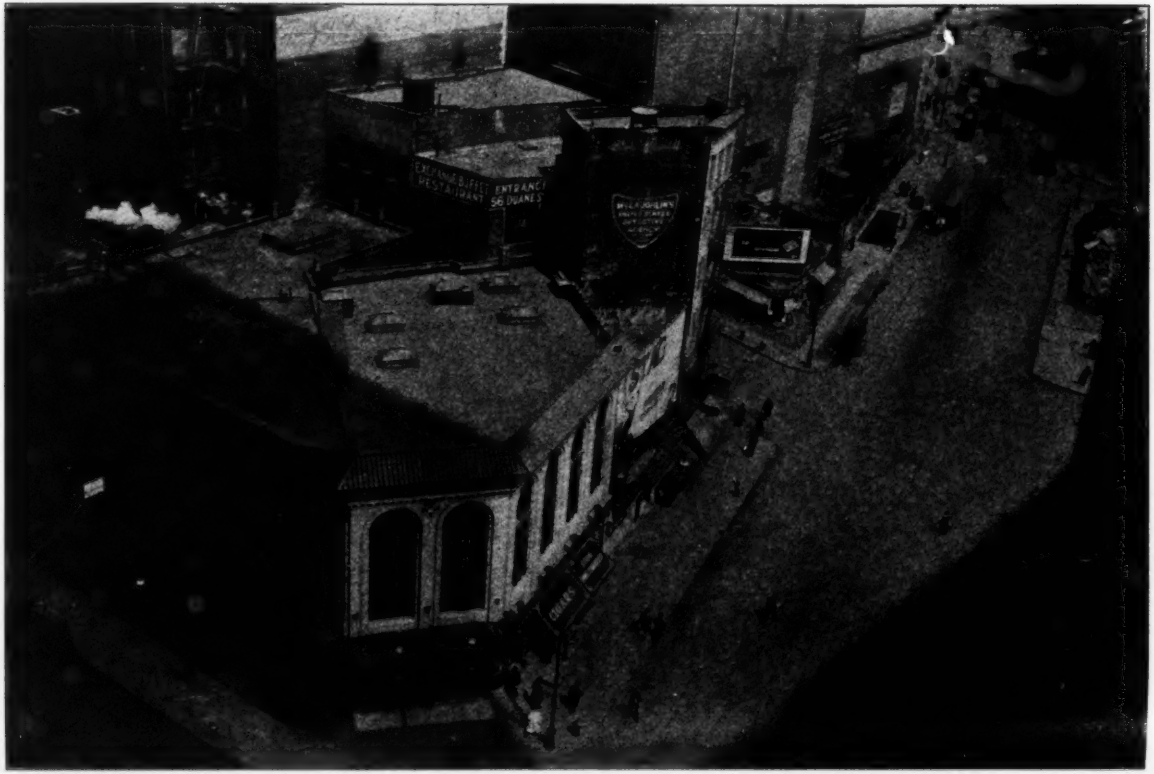
Widened 1856

Photographed 1915


WILLIAM ST.
NEW CHAMBERS ST.
PEARL ST.
119
26
30
31
32
33
35

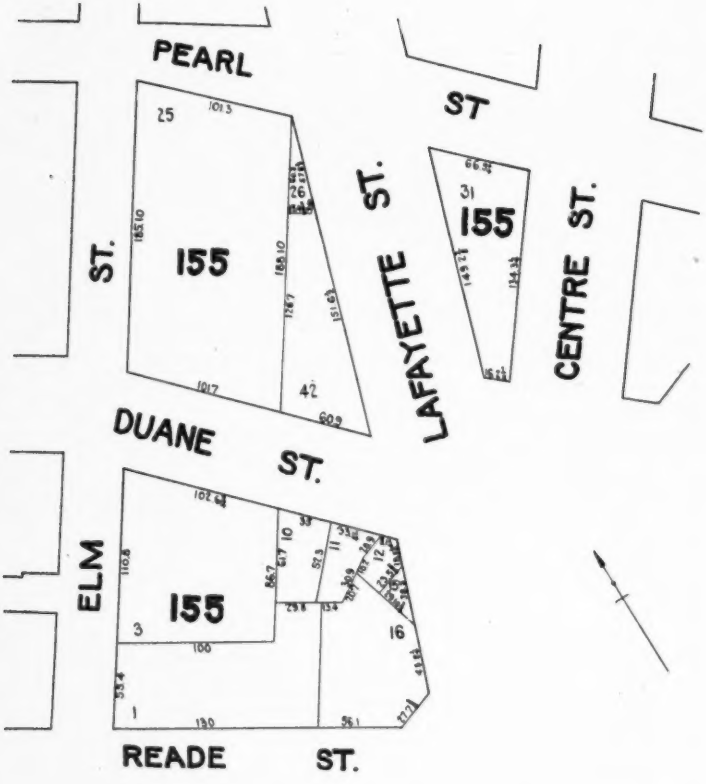
BLOCK 155—WEST SIDE OF LAFAYETTE STREET, BETWEEN READE AND PEARL STREETS

This view taken from 9th Floor Municipal Building

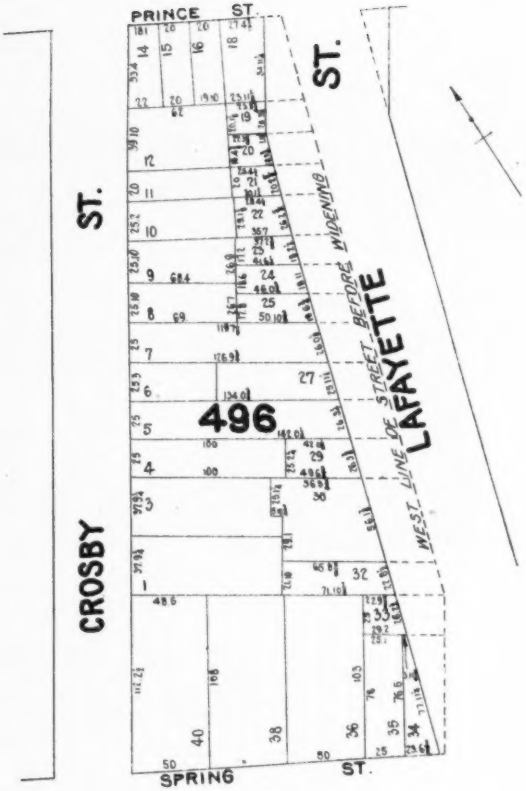


Widened 1903

Photographed 1915


PEARL
ST
ST.
155
25
42
DUANE
ST.
LAFAYETTE
ST.
31
155
CENTRE ST.
ELM
155
3
16
1
READE
ST.

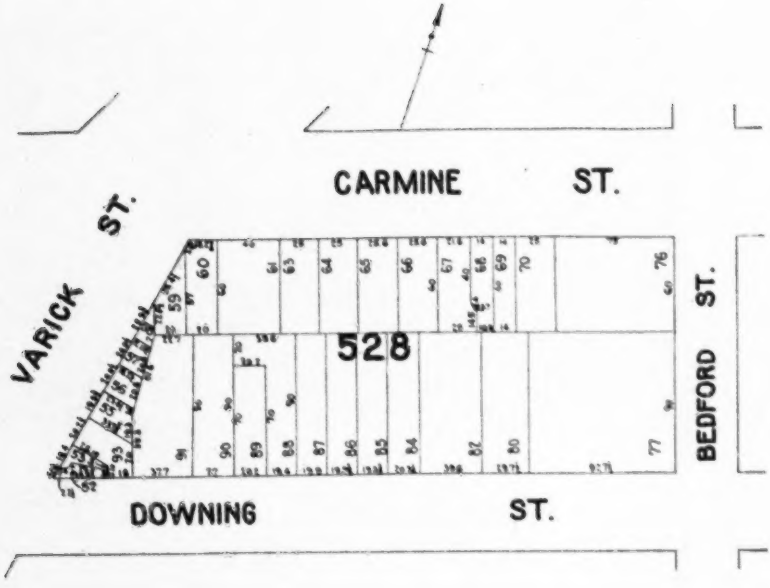
BLOCK 496—WEST SIDE OF LAFAYETTE STREET, BETWEEN SPRING AND PRINCE STREETS


PRINCE ST.
CROSBY ST.
LAFAYETTE ST.
WEST LINE OF STREET BEFORE WIDENING
496
SPRING ST.

BLOCK 528—EAST SIDE OF VARICK STREET, BETWEEN DOWNING AND CARMINE STREETS

Widened 1913

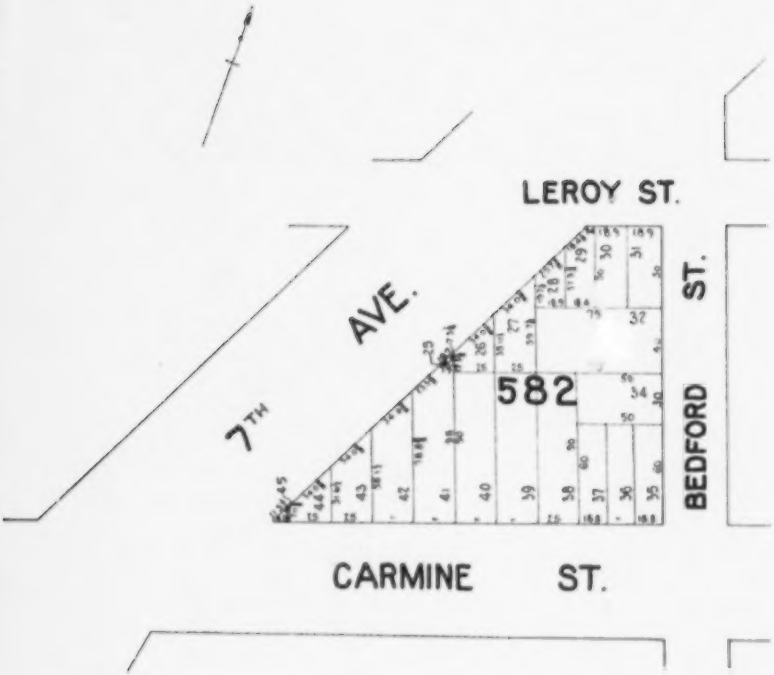
Photographed 1915


CARMINE ST.
VARICK ST.
528
BEDFORD ST.
DOWNING ST.

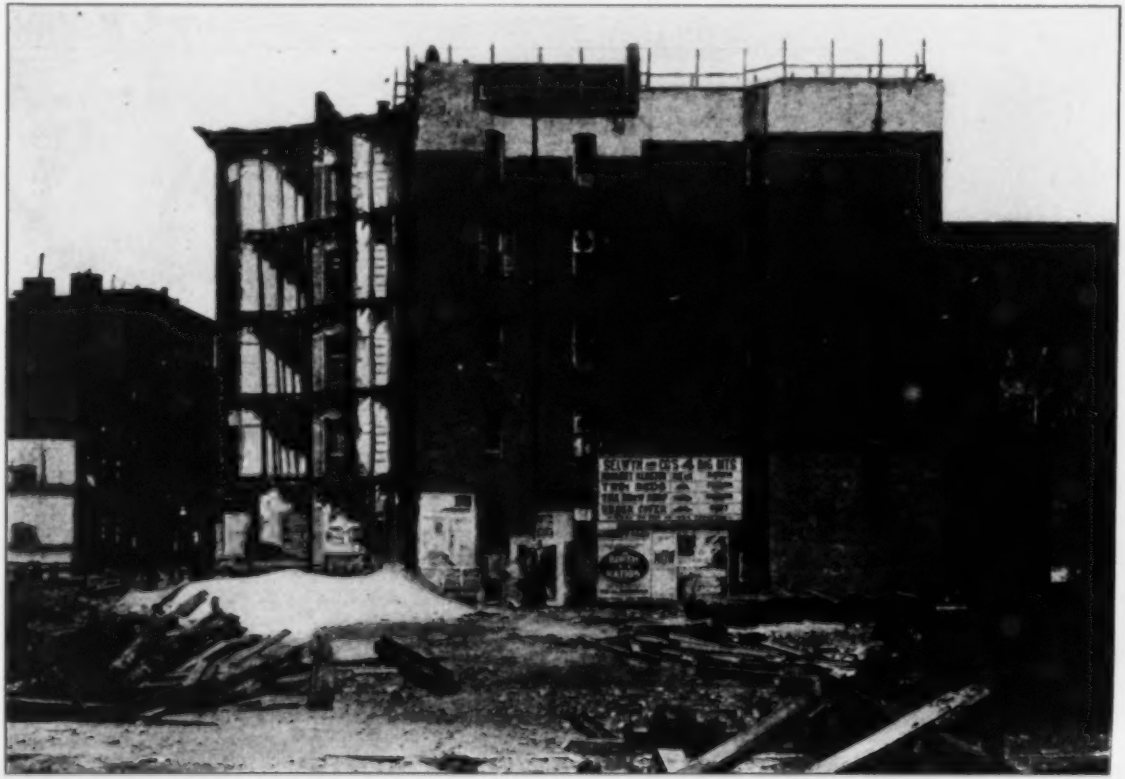
BLOCK 582—EAST SIDE OF SEVENTH AVENUE, BETWEEN CARMINE AND LEROY STREETS

Widened 1913

Photographed 1915

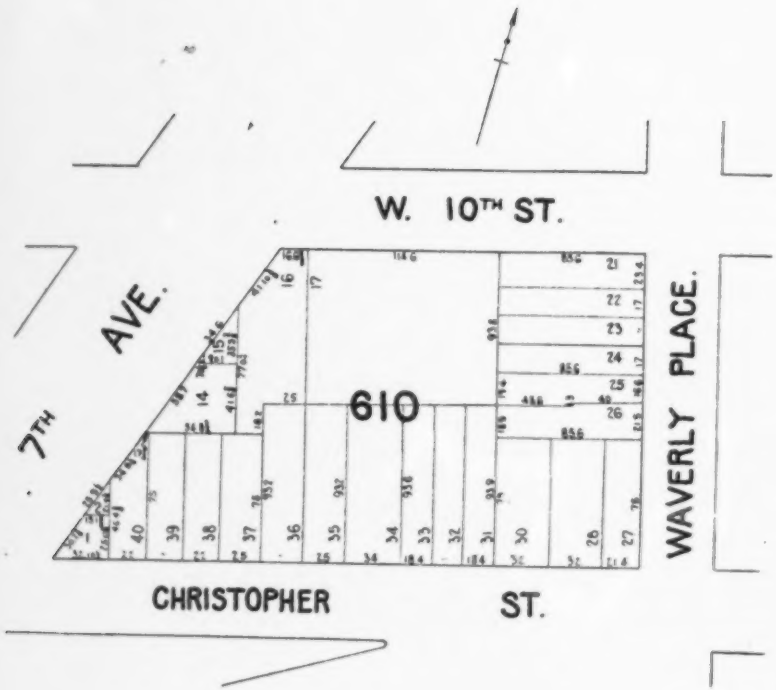

LEROY ST.
7TH AVE.
582
BEDFORD ST.
CARMINE ST.

BLOCK 610—EAST SIDE OF SEVENTH AVENUE, BETWEEN CHRISTOPHER AND WEST TENTH STREETS

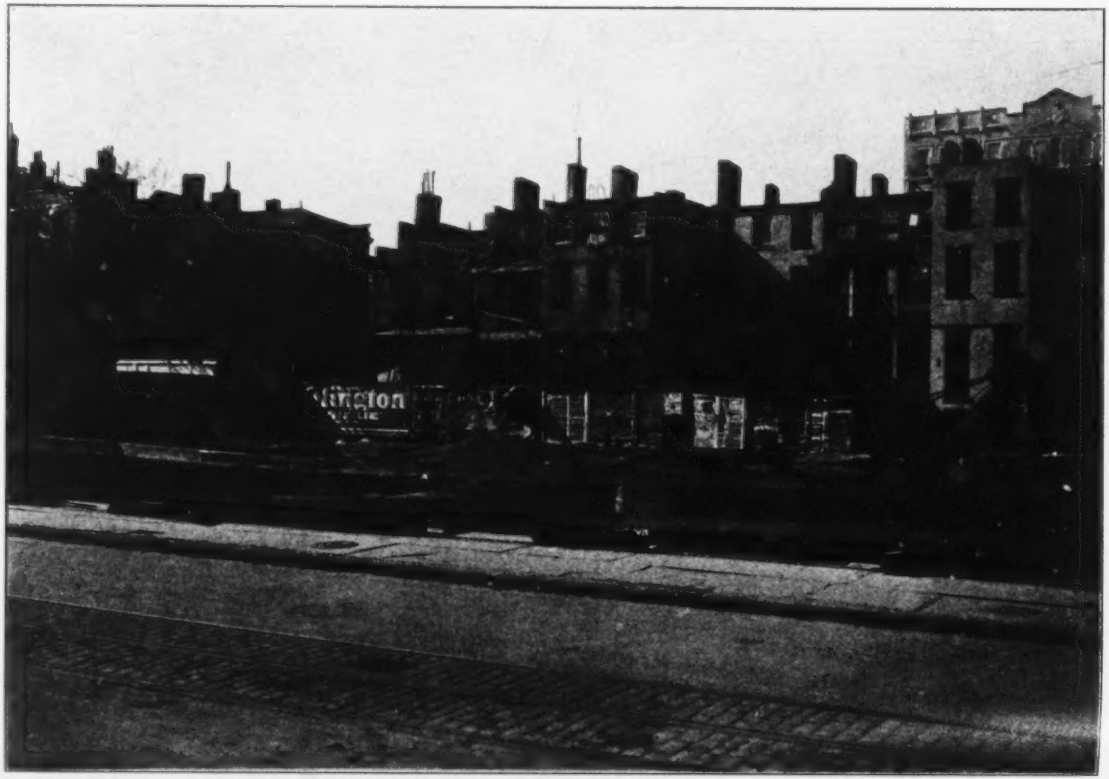


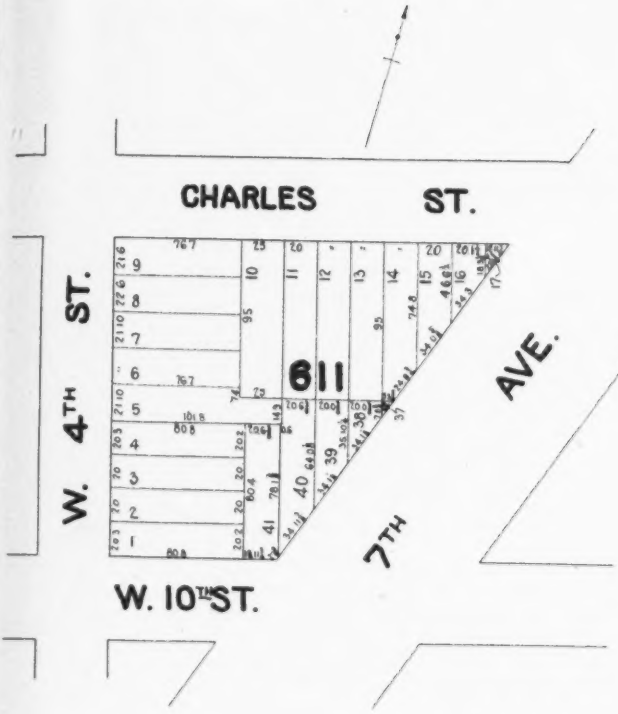
Widened 1913

Photographed 1915


W. 10TH ST.
7TH AVE.
610
WAVERLY PLACE.
CHRISTOPHER ST.

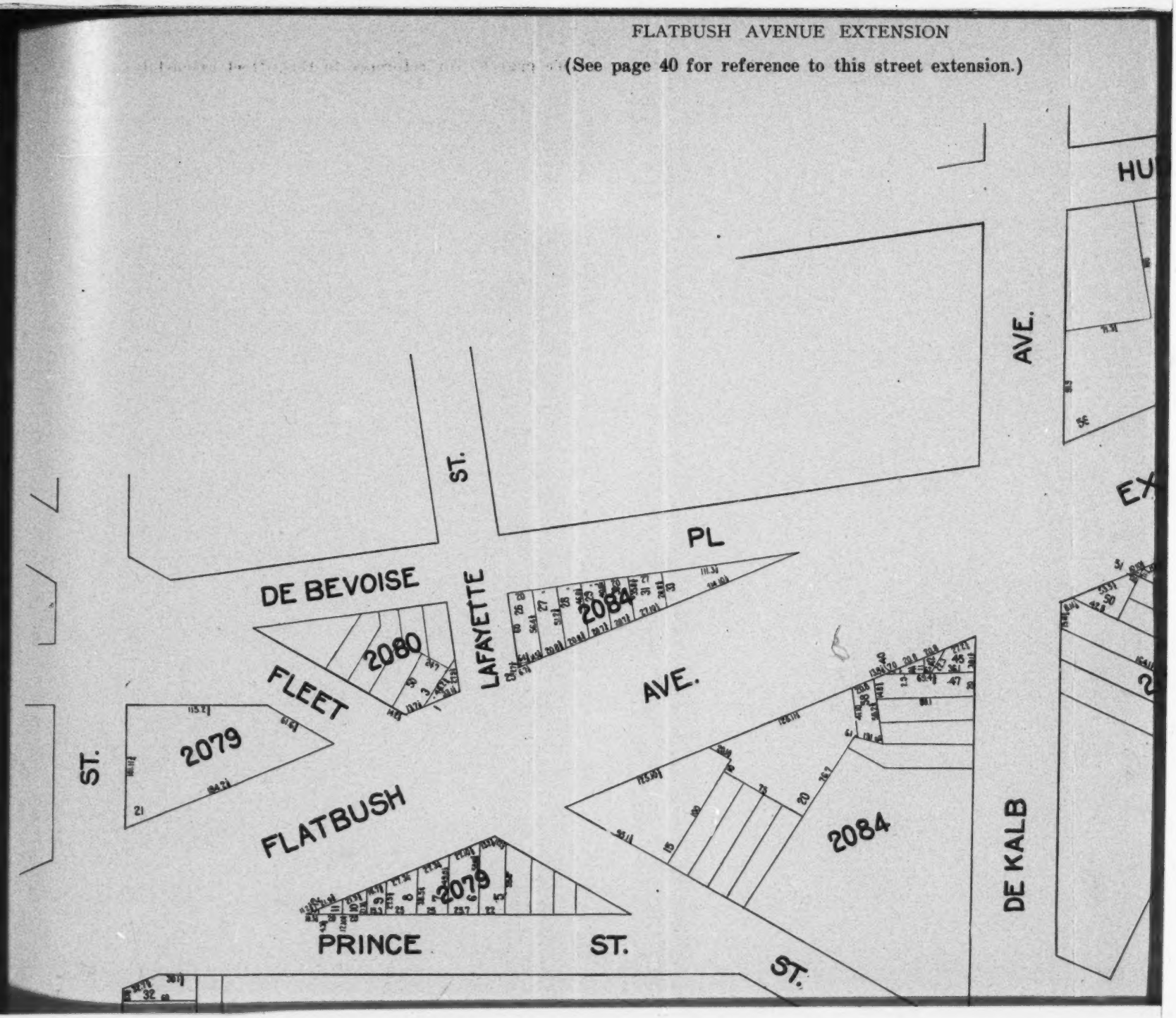
BLOCK 611—WEST SIDE OF SEVENTH AVENUE, BETWEEN WEST TENTH AND CHARLES STREETS




CHARLES ST.
W. 4TH ST.
611
AVE.
7TH
W. 10TH ST.

FLATBUSH AVENUE EXTENSION

(See page 40 for reference to this street extension.)



FLATBUSH AVENUE EXTENSION

(See page 40 for reference to this street extension.)